No. 79-6740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT BULLINGTON,
Petitioner,

v.

STATE OF MISSOURI
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR THE RESPONDENT, STATE OF MISSOURI

JAMES J. COOK
Assistant Prosecuting Attorney

HONORABLE GEORGE R. WESTFALL
Prosecuting Attorney
St. Louis County, Missouri

MARK A. MILLER
Assistant Prosecuting Attorney
7900 Carondelet
Clayton, Missouri 63105
(314) 889-2600
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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JURISDICTIONAL STATEMENT

Respondent adopts Petitioner's Jurisdictional Statement with the following exception: Petitioner's Points concerning the vagueness of the aggravating circumstances here involved are not properly before the Court at this time because of lack of finality.

STATEMENT OF THE CASE

On September 3, 1977, Pamela Sue Wright, then 18 years old, lived with her mother, sister and brother in a small house in suburban St. Louis County. Late that evening a white male broke into the basement and then proceeded into the kitchen

flourishing a shotgun. He directed Mrs. Wright and her son to lie on the kitchen floor. They were blindfolded and their hands and feet bound. Pamela's sister was not at home; nor her father who had died about a year earlier.

The intruder made certain statements to the family and then left with Pamela. After the family heard a vehicle drive off from the front of the house, they freed themselves and ran to a neighbor to call the police.

Several teenagers reported to police that they had seen a white Chevy Luv pick-up truck parked across the street from the Wright's about the time of the abduction. One of the teen-agers later identified another type of truck as being the one at the scene, but all others stated it was a Chevy Luv. Two adults also said that they saw a white Chevy Luv truck going up the street, at a time very near to the time the intruder was leaving.

Mrs. Wright and her son, John, aged 25, gave a description of the intruder and a composite portrait was drawn. This composite appeared in the newspapers. The description included a hat worn by the intruder.

An anonymous tip sent the police to the place of employment of Robert Bullington. They briefly examined his vehicle, a white Chevy Luv truck. Before they were able to question him, however, he was seen leaving his work area, never to return.

The truck was seized and a subsequent search of the interior revealed one blonde hair adhering to a long cardboard box, behind the seat in the cab of the vehicle. This hair was examined by a St. Louis County Police criminologist and found to be similar in all characteristics to hair later taken from the head of Pamela Wright's body. It was also examined against samples of others who might have had access to the truck and they were found to be dissimilar. Mrs. Wright believed him to be the man but wanted to hear the voice. After hearing at least one other person in the line-up speak, she heard Mr. Bullington speak. At

that point she became very excited and had to be assisted from the room. She identified Bullington as the intruder.

Respondent accepts the Petitioner's statement of the case so far as it relates to the procedural matters after conviction. However, Respondent would add that during the second stage of the trial, evidence was introduced concerning the aggravating circumstances. The facts of the case itself were recalled to the jury and evidence was introduced that Bullington had previously been convicted of *Kidnapping While Armed, Robbery 1st Degree, Burglary 2nd Degree and Stealing,* and *Stealing a Motor Vehicle.* The State was not allowed to introduce any evidence about the facts of these prior convictions. Only the titles of the statutes violated were read to the jury.

Two neighbors of Mr. Bullington, who observed him in his vehicle earlier in the evening of the abduction, had noted that he was wearing a hat; which they felt was unusual for him. They said the hat in the composite was similar to the hat worn by Mr. Bullington.

A Mr. Bernard Gronek sold a shotgun to Mr. Bullington one week prior to the abduction. Mrs. Wright and John have identified a shotgun identical to that sold to Mr. Bullington as looking exactly like the gun used by the intruder. When later arrested and questioned about the gun he bought from Mr. Gronek, Mr. Bullington stated that he had thrown it into the river.

After leaving his place of employment, Mr. Bullington next appeared in Guymon, Oklahoma, hitchhiking into town. He took a job with a local drilling company, but left town the day before his first paycheck. Before he left he told the secretary at the company office that he had to leave because the police would be looking for him. When asked why he didn't stop running and straighten out his problem, he stated that, for what he had done, he would have to "pay with his life."

Approximately seven days after she was abducted, Pamela Wright's body was found floating in a creek a few miles from her house and about a mile from Mr. Bullington's house. This creek was in a heavily wooded area. The body was clad only in jeans; her blouse was missing.

The doctor who performed the autopsy ruled that death was by drowning and that it takes at least four minutes for someone to die from drowning. The creek, both where she was found as well as upstream, is shallow. Although she had on no shoes or socks when found, and the area is very rocky, there were no marks on the bottom of her feet. She had a superficial laceration on her forehead. Decomposition was such that evidence of sexual assault was impossible to determine.

Time of death was determined to be somewhere within a two or three day period beginning a day or so after she was abducted. The abduction took place on a Saturday evening. Robert Bullington was at work on Tuesday, Monday being a holiday. Tuesday was the day he fled and did not return.

Robert Bullington was later arrested in California and returned to St. Louis. A line-up was held and John Wright identified him by sight.

SUMMARY OF ARGUMENTS

Point I

The Double Jeopardy Clause has never been held to bar the retrial of a defendant after he had achieved a successful appeal. *U.S.* v. *Ewell,* 383 U.S. 116, 121 (1965). A contrary rule would allow guilty persons to escape justice and prevent appellate courts zealously protecting the rights of defendants at trial. *U.S.* v. *Tateo,* 377 U.S. 463, 464 (1964). Similarily, it has been held that this Fifth Amendment protection does not prohibit an enhanced sentence upon reconviction. *North Carolina* v. *Pearce,* 395 U.S. 711, 719 (1968).

Petitioner in this cause contends that the State of Missouri is barred under Double Jeopardy principles from again seeking the death penalty because capital murder is in essence two separate criminal offenses: capital murder punishable by death and capital murder punishable by life imprisonment. A simple reading of the Missouri Capital Murder Statute reveals that there is but one crime of capital murder with a range of punishment of life imprisonment or death. Mo. Rev. Stat. §565.001. That the capital murder proceeding is bifurcated in no way changes this result. Bifurcation is a procedural device employed to protect against arbitrary and capricious imposition of the death penalty. It was given explicit approval by this Court in *Gregg. Gregg* v. *Georgia,* 428 U.S. 153, 194-195 (1976). It is not an attempt to create greater and lesser included offenses.

This Court, in *Stroud* v. *U.S.,* 251 U.S. 15. (1919), had the opportunity to address the very issue it is now asked to decide. In *Stroud,* the majority allowed a jury-imposed death sentence to be imposed after a prior jury had given a sentence of life. The Court recognized that the convictions in both cases were the same, only the punishment had been changed. *Stroud* v. *U.S.,* 251 U.S. at 17-18. The argument that enhanced sentencing was barred by the Double Jeopardy Clause was rejected as it has

been in subsequent cases. 251 U.S. at 17-18. Applying *Stroud* to this case, it cannot be doubted that the State of Missouri can again seek the death penalty.

Petitioner also relies on the principles of *Ashe* v. *Swenson,* 397 U.S. 436 (1970). *Ashe,* however, is not applicable to this case. *Ashe* requires that the Court consider whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to preclude from consideration. 397 U.S. at 443. A rational jury, could easily impose a life sentence in response to a plea of mercy and not the evidence. Additionally, *Ashe* calls for a final judgment. There is not final judgment in this case. 397 U.S. at 443. Moreover *Ashe* was aimed at curbing abuses in the area of multiple prosecutions. Such abuses are not present in the case a bar.

Likewise, the Due Process Clause presents no bar to the State of Missouri seeking the death penalty at petitioner's second trial. *Chaffin* v. *Stynchombe,* 412 U.S. 17 (1973) held that the restrictions placed on enhanced sentencing in *North Carolina* v. *Pearce,* 395 U.S. 711 (1968) apply to judge sentencing and not to jury sentencing. The *Chaffin* decision, refusing to extend the *Pearce* rationale to jury sentencing, found that the possibilities of vindictiveness present in *Pearce* were not present where the jury imposed sentence. *Chaffin* v. *Stynchombe,* 412 U.S. at 27-28.

Point II

It is not disputed that the jury in the first trial imposed on petitioner a sentence of life. This fact does not however lead to the conclusion that a death penalty imposed by a second jury is necessarily arbitrary and capricious or excessive and disporportionate. Missouri has adopted a capital murder statutory scheme very similar to the one given approval by this Court in *Gregg. Gregg* v. *Georgia,* 428 U.S. at 162-168, 188-207. The Missouri provisions, when reviewed under the dictates of *Gregg,* make it

clear that the death penalty can be imposed in a wholly constitutional manner. Contrary to petitioner's assestions, the isolated jury decision to afford mercy does not render unconstitutional death sentences imposed under a system which negates any substantial risk of arbitrariness or caprice. *Gregg* v. *Georgia,* 428 U.S. at 203. A necessary corollary of this is that the isolated decision of a jury to afford mercy does not render disproportionate and excessive death sentences imposed on defendants under a wholly constitutional capital sentencing procedure. Additionally, petitioner's position misconstrues the meaning of disproportionality. Disproportionality is found by comparing the results in two cases, not by comparing what two different juries do in a single case.

Point III

The possibility that a jury might impose a higher sentence does not impermissibly chill a defendant's right to seek a trial by jury at his second trial. *Chaffin* v. *Stynchombe,* 418 U.S. at 33 footnote 21. The *Chaffin* Court recognized the choice confronted by the defendant was subject to considerable speculation and therefore refused to intrude into this valid and legitimate state interest. *Chaffin* v. *Stynchombe,* 418 U.S. at 33 footnote 21. Similarly as this Court recognized, not all government imposed choices in the criminal process which have the effect of discouraging the exercise of constitutional rights are constitutionally forbidden. *Crampton* v. *Ohio,* 402 U.S. 185, 213 (1971).

Point IV

Petitioner in this cause has raised issues in this cause addressing whether the aggravating circumstances plead in this case are unduly vague and overbroad. This Court in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) reviewed the finality requirements of 28 U.S.C. §1257. A review of this case reveals that the present controversy does not fit into any of the

categories of cases enumerated by the Court where federal jurisdiction has been assumed even though further state proceedings are pending. A full trial is yet to be had in this matter and the Missouri Supreme Court has not had the opportunity to fully review the language presently under attack. It would appear therefore, that this Court should, in order to avoid unnecessary federal-state conflict, defer decision until such time that the Missouri Supreme Court has rendered a decision.

The merits of this issue are governed by the decisions in *Gregg* v. *Georgia* and *Godfrey* v. *Georgia,* 100 S.Ct. 1759 (1980). In *Gregg* this Court held language very similiar to that found in R.S.Mo. 565.012.2(7) not to be facially vague. *Gregg* v. *Georgia,* 428 U.S. at 201. Likewise, the *Godfrey* decision did not hold the *Georgia* wording vague, rather it attacked the interpretations and applications given the language by the Georgia Supreme Court.

The issue whether the language of Mo. Rev. Stat. §565.012.2(1) is facially vague is also governed by the dictates of *Gregg*. *Gregg* looked to see whether the statute avoids standardless sentencing on the part of jury. 428 U.S. at 196. A simple reading of this statute reveals that it provides the jury "with objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death." *Woodson* v. *North Carolina,* 428 U.S. 280, 303 (1976). Moreover, this Court found in *Godfrey* that almost identical language was considerably more specific or objectively measurable than other language it held facially valid. *Godfrey* v. *Georgia,* 100 S.Ct. at 1762, footnote 2.

ARGUMENT

Point I

The State Of Missouri Is Not Barred By Either The Double Jeopardy Clause And The Principles Of Collateral Estoppel Embodied Therein Or The Due Process Clause From Seeking The Death Penalty At Petitioner's Second Trial After The Jury At His First Trial Sentenced Him To Life Imprisonment Only.

A. Double Jeopardy

It is a well-settled principle of constitutional law that a defendant can be retried after a successful appeal of his underlying conviction, *U.S.* v. *Ball,* 163 U.S. 622 (1895), *U.S.* v. *Ewell,* 383 U.S. 116, 121 (1965). This Court has seen the permissibility of retrial as serving two competing interests. First is society's interest in punishing those guilty persons who secure a successful appeal. Second, it assures a defendant a fair trial for

> it is doubtful that an appellate court would be as zealous as they are now in protecting against the effects at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. *U.S.* v. *Tateo,* 377 U.S. 463, 466 (1964).

Thus a defendant who is retried after he has sought and achieved a successful appeal is not placed in jeopardy within the meaning of the Fifth Amendment. *Stroud* v. *United States,* 251 U.S. 15, 18 (1919).

Similiarly well-settled is the principle that the Double Jeopardy Clause presents no bar to an enhanced sentence upon reconviction. *North Carolina* v. *Pearce,* 395 U.S. 711, 719 (1968), *Chaffin* v. *Stynchombe,* 412 U.S. 17, 23-23 (1972). As pointed out by the Court in *Pearce,* a contrary holding would cast grave doubt on the principle enunciated in *Ball* and upon the unbroken line of decisions upholding that principle for almost seventy-five years. *North Carolina* v. *Pearce,* 395 U.S. at 721. Thus, the

Court reaffirmed these earlier cases and specifically declined to depart from their holdings.

Petitioner in this cause does not assert that the State of Missouri is barred from retrying him for the crime of capital murder Mo. Rev. Stat. §565.001 (1978). Rather, it is the dubious contention of the appellant that the Double Jeopardy Clause bars the state from again seeking the death penalty because the punishment assessed determines whether there was a conviction of capital murder punishable by life imprisonment or capital murder punishable by death. Is is petitioner's belief, therefore, that he was convicted of capital murder punishable by life imprisonment and acquitted of capital murder punishable by death. A close examination of the relevant statutes reveals that petitioner's position cannot be sustained.

The State of Missouri in response to *Furman* v. *Georgia,* 408 U.S. 238 (1972) and *Gregg* v. *Georgia,* 428 U.S. 153 (1976) enacted its present capital murder statute Mo. Rev. Stat. §565.001 - §565.016 (1978).[1] This statute is virtually identical to one given approval by this Court in *Gregg*. Like the Georgia statutory scheme, it calls for a bifurcated proceeding wherein guilt is determined at the first stage and the penalty at a second, separate hearing.[2] To impose the death penalty, the jury must find beyond a reasonable doubt, that an aggravating circumstance exists.[3] Although it is necessary that a jury make a specific finding that an aggravating circumstance does exist before it can impose the death penalty, there is no requirement that they find no aggravating circumstances exist to impose a

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[1] All statutes cited are set out in full in Respondent's Appendix at pp. A-1-A-6.

[2] Mo. Rev. Stat. §565.006.

[3] Mo. Rev. Stat. §565.012.

life sentence.[4] Thus, given the dictates of *Gregg*, the Missouri capital murder statute, patterned as it is after the Georgia scheme, suffers no constitutional infirmity.

The statute which defines the crime of capital murder states in pertinent part:

> Any person who unlawfully, willfully, knowingly, deliberately and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.[5]

It is clear, from reading the statute, that there is but one crime of capital murder. As was pointed out by the Missouri Supreme Court, nowhere is it stated, nor is it implied that the Missouri Legislature intended to create the greater offense of capital murder with death and the lesser-included offense of capital murder with life imprisonment.[6] Rather, it has created the single crime of capital murder and has set the range of punishment at life imprisonment with no parole for fifty years or death.

It would be a novel and unfounded legal proposition to assert that a First Degree Robbery conviction with ten years imprisonment is a lesser included offense of First Degree Robbery with

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[4] Mo. Rev. Stat. §565.012. See also excerpts from Jury Instructions and Verdict, Instructions 36-39 (J.A. 24-27).

[5] Mo. Rev. Stat. §565.001.

[6] The Missouri Supreme Court stated, "We are untilling and indeed are unauthorized to indulge in such friction. It is not our prerogative to create separate crimes from those defined by statute. The simple fact is that capital murder under §565.001 RSMo 1978 is a single crime with range of punishment at life imprisonment without probation or parole for 50 years to the death penalty. Respondent's argument not only runs contrary to the decided cases, it ignores the statutory sections which define capital murder, prescribe the punishments for that offense and detail the procedures for imposing those punishments. As noted above, there is but one crime defined as capital murder and the acts proscribed are specific in §565.001. It is for that offense Bullingtson stood convicted following the first trial and it is for that offense he remains charged and awaits trial. (J.A. 85).

fifteen years imprisonment. This, however, is what logically flows from Petitioner's position. In short, such a position uses the imposition of sentence as the deciding factor in judging what constitutes jeopardy. This Court has never followed such a strained interpretation of the Double Jeopardy Clause nor used it to reach such a specious conclusion. *North Carolina* v. *Pearce.*

Petitioner presses the contention that bifurcation alone creates greater and lesser included offenses of capital murder. To begin, this ignores the plain fact that the sentencing portion of the trial is a part of the trial itself. There is but one trial broken into two stages. The statutory language allows no other conclusion.[7] More importantly, such a position misreads the purpose of bifurcation in the capital murder trial. As this Court stated:

> The concerns expressed in Furman that the penalty of death should not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance. As a general proposition, these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information. *Gregg* v. *Georgia,* 428 U.S. at 195.

Thus it becomes apparent that the purpose of bifurcation is to insure that the constitutional rights of a defendant are protected in a capital murder case. It is an attempt to make certain that any death penalty imposed is done so under the most sure of conditions and well within constitutional mandates. The bifurcated procedure enacted by the Missouri legislature seeks to

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[7] Mo. Rev. Stat. §565.006 2

allow "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death" *Woodson* v. *North Carolina,* 428 U.S. 280, 303 (1976) and to provide "guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary." *Gregg* v. *Georgia,* 428 U.S. at 194-195. In short, the second stage of a bifurcated trial is no more than a procedural device created to protect the convicted defendant.

Petitioner relies heavily on the holding in *Green* v. *U.S.,* 355 U.S. 184 (1957). In that opinion it was held that:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.... 355 U.S. at 187-188.

Further, the Court stated that the defendant "may only be forced to run the gauntlet once." 355 U.S. at 190. This case is, however, easily distinguishable from the one at bar. First, and most importantly, in *Green,* the defendant was charged with arson and first degree murder but was convicted of arson and second degree murder, a lesser included offense. Petitioner in this cause has not been acquitted of any crime. He was convicted of capital murder. At his second trial he will be tried for capital murder. Secondly, the State of Missouri is not forcing the defendant to twice run the gauntlet; it is at his own behest that a second trial is being had. See *North Carolina* v. *Pearce,* 395 US at 721.

It is of no small import that this Court has had occasion to decide the very question now at bar. In *Stroud* v. *United States* 251 U.S. 15 (1919), the defendant was convicted of first degree

murder and sentenced to death. After a successful appeal, he was again tried and convicted of first degree murder but was not given a capital sentence. A second appeal was taken and the defendant was again successful. The third trial resulted in conviction with a death sentence being imposed. The Court in *Stroud* affirmed the sentence and stated:

> From what has already been said it is apparent that the indictment was for murder in the first degree....Each conviction was for the offense charged. It is true that upon the second trial the jury added without capital punishment to its verdict, and sentence of life imprisonment was imposed....The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder. *Stroud* v. *United States,* 251 U.S. at 17-18.

The opinion further held that "the protection afforded by the Constitution is against a second trial for the same offense..." 251 U.S. at 18. The holding of *Stroud,* despite the petitioner's suggestion, is sound and principled. It is recognized, as *Pearce* and *Chaffin* did later, that the Double Jeopardy Clause protects against further prosecution for the same offense, and not enhanced punishment at retrial. Bifurcation in no way shakes the solid foundation of this reasoned opinion. As has been shown, bifurcation is a device which has been created to protect the defendant. It is not a new branch of double jeopardy jurisprudence. This latter notion is borne out by *Stroud,* for implicit in that opinion is that the underlying conviction and not the punishment imposed dictates whether the double jeopardy prohibitions have been ignored.

Applying *Stroud* to the case at bar, it becomes clear that the State of Missouri can again seek the death penalty. Petitioner was convicted of capital murder at his first trial. The fact that a sentence of life imprisonment was imposed does not render it any less a conviction for capital murder. *Stroud* v. *U.S.* 257 at

18. It having been established that the Double Jeopardy Clause presents no bar to enhanced punishment, a capital sentence can be imposed against the petitioner at his second trial. *Stroud* v. *U.S.*

Petitioner in this cause also asserts that the issue of punishment has been litigated and imposed and remains undisturbed by the granting of a new trial. Petitioner relies on the collateral estoppel principles set forth in *Ashe* v. *Swenson,* 397 U.S. 436 (1970). This is a variant of the Fifth Amendment Double Jeopardy argument. In support of this position, petitioner points to the supposed findings of the jury at the second stage of the trial and to respondent's statement that the same evidence presented at the first sentencing hearing would be presented at the second.

Ashe held that the principles of collateral estoppel are embodied in the Fifth Amendment's prohibition against Double Jeopardy. Simply, this means "that where an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated in any future lawsuit." *Ashe* v. *Swenson,* 397 U.S. at 443. The Court is *Ashe* stated:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of the 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe* v. *Swenson,* 397 U.S. at 443-444.

An examination of the *Ashe* decision reveals its inapplicability to the present fact situation. First the *Ashe* rationale calls for a valid and final judgment. This case has neither. At petitioner's initiative a new trial is being had. The first trial is now a nullity, without any legal effect. Petitioner, however, seeks to pick and choose between those issues which are to be retried. This position ignores the premise that the original conviction, at the defendant's behest, has been wholly nullified and the slate wiped clean. *North Carolina* v. *Pearce,* 395 U.S. at 721. Secondly, the *Ashe* test requires that a court consider whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to preclude from consideration. *Ashe* v. *Swenson,* 397 U.S. at 443. An examination of the jury's finding in this case reveals that a jury could have based its verdict on something other than the absence of aggravating circumstances. There is no requirement in Missouri that a jury make a specific finding that no aggravating circumstance existed to impose a life sentence.[8] Clearly, the first jury might have imposed life imprisonment in response to defendant's plea for mercy rather than a finding of no aggravation. (J.A. 88). Thus, it cannot be said with any certainty, especially given the nature of this case, that the jury found that no aggravating circumstance existed. Thirdly, petitioner's argument misses the purpose of the *Ashe* rationale. *Ashe* sought to curb abuses arising in the multiple prosecution situation. Those abuses are not present here. Rather, petitioner faces but one prosecution on the charge of capital murder. Lastly, *Ashe* looked to convictions, not punishment.[9]

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[8] See Missouri Approved Instructions, Excerpts from Jury Instructions, (J.A. 24-27).

[9] Petitioner's argument, if accepted, would allow him to do what he is unable to achieve under a standard Double Jeopardy analysis; that is, it would allow for a 5th Amendment finalty to the imposition of sentence. Further, it would call for, at least, an implicit overruling of *Stroud* v. *U.S., North Carolina* v. *Pearce,* and *Chaffin* v. *Stynchcome, supra.*

The absence of any new evidence for presentation at the new sentencing proceeding has no bearing on the applicability of *Ashe* to the case at bar. Any second trial will almost inevitably involve the presentation of the same evidence used at the first. The Court in *Ashe* did not hold impermissible the presentation of the same evidence at retrial after a successful appeal. Rather it sought to prohibit the State from trying its case in a "dry run fashion." This problem is not present here. The State of Missouri tried its case at both stages as it would normally do in any trial. It has not been stated nor implied that the original trial was an attempt by the State to test the strength of its case. *Ashe,* 397 U.S. at 477. The reason that it is again putting forth its evidence is simply because the petitioner sought and secured a new trial. See *Stroud* v. *U.S., North Carolina* v. *Pearce.*

It becomes apparent, for the reasons given above, that *Ashe* is inapposite to the situation at bar. (J.A. 88). The rationale of that case sought not to overturn established Double Jeopardy principles, but instead to supplement them in a particular area. The abuses it looked to eliminate are not found in the facts now before the Court and any reliance on its rationale, absent those circumstances, is ill-founded. It follows, therefore, that *Ashe* in no way hinders the State of Missouri from seeking the death penalty at the second trial of petitioner.[10]

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[10] Although not raised specifically in petitioner's brief, mention should be made of the standard of proof at the sentencing stage of the capital trial. This standard, like bifurcation itself, is but another protection afforded the convicted defendant at the capital trial. Like bifurcation, this standard should not be viewed as a means to create two trials or two offenses, but rather as another procedural safeguard. This conclusion is bolstered by the Court's decision in *Profitt* v. *Florida,* 428 U.S. 242 (1976), which allowed a sentencing judge to impose a sentence of death, thus overruling an advisory jury recommendation of life. The judge's decision was judged under a "clear and convincing" standard. Thus, it appears that the "beyond a reasonable doubt" standard is not constitutionally required.

In conclusion, it is clear that the State of Missouri can seek the death penalty at petitioner's second trial without offending long-established double jeopardy principles. The "prohibition is not against being twice punished, but against being twice put in jeopardy." *Price* v. *Georgia,* 398 U.S. 323, 326 (1969). Petitioner was fined and convicted of capital murder, a crime with a range of punishment of life imprisonment without parole for fifty years or death. He was given a life sentence and then sought and won a new trial. The Fifth Amendment prohibition does not bar, after successful appeal, the retrial of a defendant for the crime of which he was convicted, nor does it prohibit enhanced punishment at his second trial. Bifurcation does not change this. Indeed, it would be a strange turn of events if bifurcation, a shield erected to protect the rights of a convicted defendant, was made a sword, piercing the armor of justice.

B. Due Process

The Due Process Clause has been held to bar the imposition of a higher judge-imposed sentence at a second trial after a successful appeal. *North Carolina* v. *Pearce,* 395 U.S. at 723. The Court in *Pearce* feared that increased punishment would be imposed as a penalty against those persons who pursued and won a new trial, 395 U.S. at 723. The imposition of such a punishment, the Court reasoned, would be patently unconstitutional. The majority opinion in Pearce Explained:

> Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. 395 U.S. at 725.

To combat this possibility, a remedy was fashioned which required the sentencing judge, who imposed a higher sentence after the second trial, to affirmatively state why the sentence was increased. 395 U.S. at 726. The majority in *Pearce* held further that the reasons for increased punishment must be based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726. Thus, while higher sentencing by a judge at a second trial after a successful appeal was extremely curtailed, the opinion did not make all higher sentencing a *per se* Due Process violation.[11]

In *Chaffin* v. *Stynchombe,* 412 U.S. 17 (1973), an attempt was made to expand the *Pearce* rationale to jury sentencing. Mr. Justice Powell writing for the majority specifically refused to do so stating:

> While we reaffirm the underlying rationale of *Pearce* that vindictiveness against the accused for having successfully overturned his conviction has no place in the resentencing process, whether by judge or jury, we hold today that due process of law does not require extension of *Pearce*-type restrictions to jury-sentencing. 412 U.S. at 18.

The Court in *Chaffin* explained that the *Pearce* decision was based on the need to protect successful defendants against vindictiveness in the resentencing process. The majority continued, stating:

> Pearce was not written with a view to protecting against the mere possibility that, once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process. The possibility of a higher sentence was recognized and ac-

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[11] *See also Colten* v. *Kentucky,* 407 U.S. 104 (1972) *Ludwig* v. *Massachusetts,* 427 U.S. 618 (1975)

cepted as a legitimate concomitant of the retrial process. 412 U.S. at 25.

The Court therefore analyzed enhanced sentencing by a jury by inquiring into whether there was the possibility of vindictiveness occasioned in *Pearce*.[12] In so doing, the Court found "the potential for such abuse of the sentencing process by the jury *de minimus* in a properly controlled retrial."[13] The opinion based this finding on the fact that a properly empaneled jury is not informed of the prior case or sentence.[14] The Court also enumerated other factors which distinguished jury from judge resentencing. First, the sentence is not being imposed by the "same judicial authority" whose decisions at trial required reversal. Thus, unlike in *Pearce,* the sentencing authority has no "personal stake" in the first trial nor "the motivation to engage in self-vindication." 412 U.S. at 27. Secondly, a jury unlike a judge is not subject to institutional pressures or interests. Therefore, a jury is unlikely to increase sentencing at a second trial to discourage meritless appeals. 412 U.S. at 27.

Blackledge v. *Perry,* 417 U.S. 21 (1973) reaffirmed the principles of *Pearce* and *Chaffin.* In this case the Court was faced with the question of whether opportunities for vindictiveness on the part of the prosecution were such that a *Pearce*-type rule was warranted. In holding that such a rule was warranted, the

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[12] The facts in *Chaffin* are analogous to the situation at bar. In *Chaffin* the defendant was charged with robbery, a capital offense. The State asked for the death penalty and the jury returned a fifteen year sentence. At the second trial, the death penalty was again sought, with the jury imposing a sentence of life imprisonment.

[13] Petitioner has not asserted that such a jury could be empaneled.

[14] The Court further stated at 26-27 that "it is more likely that the jury will be aware that there was a prior trial, but it does not follow from this that the jury will know whether it resulted in a conviction or mistrial."

Court held it constitutionally impermissible for the State of North Carolina "to respond to the (defendant's) invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo."[15] The Court stated:

> There is, of course no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." We think it clear that the same consideration apply here.

It is important to note that the opinion in *Blackledge* does not expressly address the problem involved where the prosecution seeks a higher sentence at the second trial than it sought at the first trial. Of course, that is not the case here.[16]

A review of this trilogy of cases makes it clear that the Due Process Clause presents no bar to the State of Missouri seeking the death penalty at the second trial. The *Pearce* case is inap-

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[15] In *Blackledge,* the defendant was charged with the misdemeanor of assault with a deadly weapon. He was tried and convicted in the District Court, Division of the General Court of Justice. Defendant, pursuant to statute filed an appeal to the Superior Court. He had an absolute right to this trial de novo. Under North Carolina law, the slate is wiped clean. After filing this notice of appeal, but before the trial, the Prosecuting Attorney sought and received a felony indictment charging the defendant with Assault with a Deadly Weapon with Intent to do Bodily Harm. The defendant plead guilty to the indictment and was sentenced to 5 to 7 years.

[16] Footnote 13 in Chaffin does state that it is desirable that the prosecution seek the same penalty at both trials. The Court felt that this evidenced no vindictiveness on the part of the prosecution.

plicable for the reason that the jury will impose the sentence at the second trial. Similarly, *Blackledge* and its possible applications have no bearing on this case. The State of Missouri sought a capital murder conviction and the death penalty against the petitioner at the first trial and will do so at the second. Thus, it is apparent that the fears of possible vindictiveness by the prosecution found in *Blackledge* are not present.

The controlling principles of law in this case are found in *Chaffin*. *Chaffin*, like the situation at bar, was concerned with the propriety of increased sentencing by a jury upon retrial. The opinion established the principle that there being no likelihood that the jury in the second trial will sentence with vindictiveness, an increased punishment by the jury will not violate the Due Process Clause. 412 U.S. at 27-28. Applying this rationale to the case at bar, it is clear that the imposition of the death penalty by the jury at petitioner's second trial will not result in the violation of any constitutional guarantee. That this is a bifurcated proceeding is of no consequence to applicability of the *Chaffin* decision for, as this Court has recognized bifurcation alone does "not wipe away the fundamental differences between jury and judicial sentencing."[17] 412 U.S. at 28 No. 15.

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[17] In Footnote 15, the Court stated, "While some jury sentencing states have adopted bifurcated jury trials, in which the jury assesses the punishment in a separate proceeding after a verdict of guilty has been rendered (citations omitted) bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing. It may make little sense to supply the jury with information about the defendant's conduct if the goal of jury sentencing is not necessarily to fit the punishment to the offender, and if the jury is therefore, not concerned about matters considered pertinent to judicial sentencing.

Petitioner and recent court of appeals cases suggest that approximation of the *Pearce* limitations could be realized either by instructing the jury that it may return no verdict higher than the former sentence, or by empowering the judge to reduce the second sentence whenever it exceeds the former sentence (citations omitted). Although these alternatives would provide an absolute protection from the possibility of vindictiveness, they would also interfere with ordinary sentencing discretion in a manner more intrusive than contemplated by *Pearce*.

It must be remembered that the Due Process Clause is not violated by all possibilities of increased punishment upon retrial, "but only those that pose a realistic likelihood of vindictiveness." *Blackledge* v. *Perry,* 417 U.S. at 27. This concern is absent in this case. Petitioner has not asserted, nor is there any reason to believe that petitioner faces a "realistic likelihood" that vindictiveness will assume a role in the jury's sentence. Thus, it would be particularly unfortunate to place such needless contraints upon jury discretion as those urged by petitioner in an area where individualized consideration of each offender is constitutionally required. *Lockett* v. *Ohio,* 438 U.S. 586,604 (1978). Similarily, the establishment of a *Pearce* type rule in the area of jury-sentencing would deliver a severe blow to the legitimate practice of allowing each jury to impose sentence based on its own assessment of the evidence. *Chaffin* v. *Stynchombe,* 412 U.S. at 32.

II

A Sentence Of Death At Petitioner's Second Trial After The Jury At The First Trial Imposed A Sentence Of Life Imprisonment Will Not Violate The Petitioner's Constitutional Right That A Sentence Not Be Excessive And Disproportionate Nor Will It Violate His Constitutional Protection Against Imposition Of The Death Penalty In An Arbitrary And Capricious Manner.

This Court in *Gregg* v. *Georgia,* 428 U.S. 153 (1976) held that the death penalty could be inflicted for the crime of murder. 428 U.S. at 181. Recognizing the uniqueness of the death penalty and its prior holding in *Furman* v. *Georgia,* 408 U.S. 238 (1972), the Court mandated that capital punishment "not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." To minimize this possibility the majority demanded that the discretion of the sentencing authority be suitably directed and limited. 428 U.S. at 188-189.

They would achieve in the name of due process, the substance of the result we have declined to approve under the Double Jeopardy Clause."

The Court in *Gregg* examined the capital punishment procedures enacted in the State of Georgia. In holding that the Georgia statute met the concerns of *Furman* and thus that the sentence of death could be constitutionally imposed in Georgia, this Court pointed to several aspects of the statutory scheme. 428 U.S. at 198,207. First, the Court reviewed, with favor, the bifurcated trial, citing the findings of the drafters of the Model Penal Code. 428 U.S. at 181-193. Secondly, the majority pointed to the list of aggravating circumstances found in the statute and stated that this required the jury "to consider the circumstances of the crime and the criminal before it recommends sentence." 428 U.S. at 196-197. Lastly, the Georgia statute called for automatic appeal of a death sentence to the Supreme Court of Georgia. This was seen as an important additional safeguard against arbitrary and capricious imposition of the death penalty for it required the highest court of that state to review each death sentence and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supported the jury's findings of a statutory aggravating circumstance and whether the sentence was disproportionate compared to those sentences imposed in similar cases. 428 U.S. at 198.

The State of Missouri has adopted a statutory scheme very similar to the one found in Georgia.[18] The Missouri legislature enacted its procedures in response to the directives set forth in Gregg. The Missouri provisions, in order to reduce the likelihood of arbitrary and capricious imposition of the death penalty, call for a bifurcated proceeding.[19] After a finding of guilty, a sentencing hearing is held wherein the jury considers both aggravating and mitigating circumstances as to the of-

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[18] Both states have patterned their procedures after the Model Penal Code (ALI) Proposed Official Draft (1962).

[19] Mo. Rev. Stat. §565.006.

fender and the offense.[20] If the death penalty is imposed, mandatory review is had to the Missouri Supreme Court.[21] It is the duty of that court to determine "whether the evidence supports the jury's or judge's finding of statutory aggravating circumstance" and "whether the sentence imposed is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[22]

It is clear that under the principles set forth in *Gregg,* the death penalty can be imposed in a wholly constitutional manner in the State of Missouri. The statutory scheme allows for consideration of the individual circumstances of each offense and the particular offender. *Woodson* v. *North Carolina,* 428 U.S. at 304; *Lockett* v. *Ohio,* 438 U.S. at 604. Further, as is constitutionally mandated, it gives guidance to the jury and provides it with direction so as to minimize the risk of arbitrary and capricious imposition of the capital sanction.

Petitioner asserts, that because a jury imposed a life sentence at the first trial, a sentence of death at the second would necessarily be imposed in an arbitrary and capricious manner. This argument must fail for it misreads this Court's opinion in *Gregg.* The Supreme Court of Missouri is required by statute to review the jury's finding of an aggravating circumstance. Additionally, that Court must determine whether the sentence imposed by the jury is proportionate to sentences imposed in similar cases. It does not follow that a life sentence imposed by a jury that chooses to show mercy renders unconstitutional death sentences imposed under constitutional procedures. As the Court in *Gregg* explained:

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[20] Mo. Rev. Stat. §565.012.

[21] Mo. Rev. Stat. §565.014.

[22] Id.

> The petitioner next argues that the requirements of *Furman* are not met here because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. This contention misinterprets *Furman*. Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportionate to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice: *Gregg* v. *Georgia,* 428 U.S. at 203.

Imposition of the death penalty by the jury at petitioner's second trial, therefore, would be permissible given the capital sentencing procedures established in Missouri.

Similarly, the petitioner maintains that because the first jury imposed a life sentence, the imposition of the death penalty at a second trial would necessarily be disproportionate and excessive.

In asserting this proposition, petitioner relies heavily on the fact that the prosecution seeks to introduce the same evidence at the second trial. This argument ignores in the first instance that this Court has held that the death penalty could be imposed for the crime of murder. *Gregg* v. *Georgia,* 428 U.S. at 181. Secondly, this reasoning cuts against the teachings of *Gregg*. The Court in that case stated that "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." *Gregg* v. *Georgia,* 428 U.S. at 203. A necessary corollary of this is that the isolated decision of a jury to afford mercy

does not make disporportionate and excessive death sentences imposed on defendants under a wholly constitutional capital sentencing procedure.

Moreover, this position misconstrues the meaning of disproportionality. Disproportionality is found by comparing the results of two or more different cases, not by comparing what two different juries do in a single case. *See Ward* v. *State,* 236 S.E.2nd 365, 369 (J. Bowles Dissenting) (GA, 1977). It would go against sound judicial reasoning to compare the finding of the first jury in a case without legal effect with what the second jury could do with the same facts and then decide what is disproportionate. See *Ward* v. *State,* 236 S.E.2d at 369. Not only would a reviewing court be using a void judgment for purposes of comparison, it would be concerning itself with the unanswerable question, "which verdict is correct?" The problem is further complicated by the very real possibility that the first jury, in deeming life imprisonment appropriate, ignored the evidence presented to it. Simply stated, this case cannot be compared against itself for the purposes of disproportionality. Logically, then, it follows that the valid sentence, that is the jury imposed sentence finally left standing in this case, must be the one used for the purposes of comparison. Only then can a reviewing court truly decide whether a sentence is disproportionate within the meaning of *Gregg.*

In conclusion, the imposition of the death sentence by a jury in the second trial will not constitute imposition of the death penalty in an arbitrary or capricious manner nor will it constitute an excessive or disproportionate sentence. As shown above, the Missouri capital sentencing procedures are well within both the mandate and spirit of *Gregg.* The fact that an earlier jury imposed a life sentence is irrelevant to this cause. The State of Missouri should not, therefore, be barred from seeking the death penalty at petitioner's second trial.

III

Permitting The State Of Missouri To Seek The Penalty Of Death After The Jury At His First Trial Returned A Sentence Of Life Imprisonment Does Not Unconstitutionally Chill The Exercise Of The Right To Trial By Jury At His Second Trial.

The question whether imposition of a higher sentence unconstitutionally and thus impermissibly chills a defendant's right to trial by jury is answered by the principles set forth in *Chaffin* v. *Stynchombe,* 412 U.S. (1972). The Court in *Chaffin* stated that absent vindictiveness, higher sentences could be imposed in spite of "whatever incidental effect they might have on the right to appeal."[23] 412 U.S. at 29. Further, the Court, in addressing petitioner's contention that *United States* v. *Jackson,* 390 U.S. 570 (1967) compelled a different result, held that "the Constitution did not forbid all Government-imposed choices in the criminal process that have the effect of discouraging the exercise of constitutional rights." 412 U.S. at 30. The Court continued, quoting *Crampton* v. *Ohio,* 402 U.S. 185, 213 (1971):[24]

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow.... Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose". 412 U.S. at 32.

Recognizing that the inquiry by its very nature, must be made on a case by case basis, the *Chaffin* court indicated that the "threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." 412 U.S. at 32.

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[23] See also *Colten* v. *Kentucky,* 407 U.S. 104 (1972).

[24] See *Mc Gautha* v. *California,* 402 U.S. 103 (1971).

Turning to the case at bar, it becomes clear that the rationale in *Chaffin* is controlling. Here, as in *Chaffin,* the defendant is faced with the possibility that a sentence of death might be imposed at the second trial. Both were faced with difficult choices, but the mere fact that the choices may be difficult does not in an of itself make them unconstitutional. See 412 U.S. at 30. The *Chaffin* majority recognized that jury sentencing, based on each jury's assessment of the evidence is a legitimate practice. 412 U.S. at 32. The fact that as an incidental consequence of this the accused may be required to choose between risking a higher sentence at retrial or waiving his rights, is permissible. This is true whether it is the right to appeal or the right to trial by jury, 412 U.S. at 32-33.

Petitioner relies heavily on the Court's decision in *United States* v. *Jackson,* 390 U.S. 570 (1968). The statute in that case, 18 U.S.C. §1201(a) allowed for the imposition of the death penalty in kidnapping cases only after a jury trial. It did not allow for the imposition of a capital sentence after a bench trial. The statute was held unconstitutional in that it impermissibly detered the defendant's right to demand a trial by jury. It appears that the holding in *Jackson* is limited to the statutes which on their face penalize the assertion of constitutional rights. (J.A. 93). This conclusion seems especially strong in light of this Court's opinions in *Brady* v. *United States,* 397 U.S. 742 (1974) and *North Carolina* v. *Alford,* 400 U.S. 25 (1970). *Brady* held that a guilty plea entered to avoid the death penalty under 18 U.S.C. §1201(a) was not invalid because it was entered to avoid the possibility of a death sentence. *Brady* v. *U.S.,* 397 U.S. at 755. Similarly in *Alford,* the Court held that "the Court of Appeals for the Fourth Circuit was in error to find Alford's plea of guilty invalid because it was made to avoid the possibility of the death penalty. *North Carolina* v. *Alford,* 402 U.S. at 39. The Court stated that a valid plea of guilty could be entered even though the defendant was unable or unwilling to admit guilt. *North Carolina* v. *Alford,* 400 U.S. at 37. The clear principle drawn from these cases is that the possibility of the death penalty

being imposed does not needlessly nor impermissibly chill a defendant's right to demand a trial by jury.

Similarly, it should be noted that this Court has rejected the argument that unrestricted jury resentencing has an impermissible "chilling effect" on a defendant's right to select a jury upon retrial. *Chaffin* v. *Stynchombe,* 412 U.S. at 33, footnote 21. The *Chaffin* Court further held that *Jackson* did not require a contrary result. 412 U.S. 32, footnote 20; 33, footnote 21. The majority recognized that the choice involved in deciding whether to forego a jury was based on "considerable speculation." The Court refused, therefore, to impinge on jury sentencing, a practice seen as both legitimate and valid state interest. *Chaffin* v. *Stynchombe,* 412 U.S. at 33, footnote 21.

The principles of *Chaffin* lead to the conclusion that the possibility that the second jury might impose a higher sentence does not impermissibly chill a defendant's right to trial by jury. *Chaffin* v. *Stynchombe,* 412 U.S. at 32-33. As the Court in *Chaffin* recognized, there is doubt that the possibility of a higher sentence does in fact "chill" most defendants, 412 U.S. at 32-34. This seems especially true in cases where the defendant faces the prospect of spending the next fifty years of his life in prison.

IV

The Issue Whether The Aggravating Circumstances Plead In This Cause Are Unduly Vague And Overbroad In Violation Of The Due Process Clause Of The XIV Amendment Is Not Final Within The Meaning Of 28 U.S.C. 1257 And The Court Would Therefore Act In Excess Of Its Jurisdiction If It Decided This Issue At This Time.

In The Alternative, Should This Court Decide This Issue, Respondent Asserts That The Aggravating Circumstances Plead In This Cause Are Not Unduly Vague And Oberbroad In Violation Of The XIV Amendment Of The United States Constitution.

A. Finality

This Court in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) reviewed the finality requirements of 28 U.S.C. §1257. The majority stated that there are at least four categories of cases in which the Court has treated the decisions on the federal issues involved as final judgments and assumed jurisdiction even through additional proceedings were still to be had in the state courts, 420 U.S. at 477. The Court noted that in almost all of these cases the additional proceedings would not require the decision of other federal questions by this Court at some later date, *420 U.S. at 477.*

The first category of cases require further proceedings at the state court level but the federal question is conclusive of the issues or the outcome of the proceedings are preordained, 420 U.S. at 479. The second group of cases involve federal questions, finally decided by the highest court in the state, which will survive and require a decision regardless of the outcome of the state proceedings. *420 U.S. at 480.* The third categaory involves cases where the federal question has been finally decided with further state proceedings to be had, but in which later review of the federal question cannot be had whatever the ultimate outcome of the case. *420 U.S. at 481.* The last category of cases are those where the federal question has been finally decided with further proceedings pending in which the party seeking review might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining an evidentary matter in the pending state proceedings. *420 U.S. at 481.*

A review of the case at bar reveals that it fails to fit into any of the categories enumerated in the *Cohn* decision. The federal

issue[25] in this case is not conclusive of the issues nor is the outcome of this case preordained, *420 U.S. at 479.* A capital murder trial will be had whether or not this issue is heard. Additionally, the verdict of the jury in the second trial can clearly not be said to be preordained. Thus, this "case is not for practical purposes concluded," *420 U.S. at 479.* Secondly, the federal issue will not necessarily survive regardless of the outcome of the proceedings. 420 U.S. at 480. If the defendant is acquitted or receives a life sentence at the second trial, this issue will become moot. Conversely, review of this issue will not necessarily be lost whatever the outcome of the case. 420 U.S. at 481. The issue can again be raised if the death penalty is imposed. It should be noted also, that this issue was not raised upon appeal by the state, thus the rationale of *California* v. *Stewart* is not applicable.[26] *California* v. *Stewart,* 384 U.S. 436 (1966). Lastly, it does not fall within the fourth category of cases mentioned in *Cohn* for the reason that a decision of this issue will not be preclusive of the cause of action, *420 U.S. at 483.* As pointed out earlier, a capital murder trial will ensue regardless of any decision the Court might reach on this issue. Therefore, this case does not fall within any of the principles of *Cohn.*

It has been concluded that it is not this Court's duty to discourage appeals. *Republic Natural Gas Company* v. *Oklahoma,* 344 U.S. 62, 71 (1947). On the other hand, the Court should not decide issues of constitutional dimension

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[25] For the purpose of this argument, the federal issue referred to is "whether or not the aggravating circumstances are unduly vague and overbroad and therefore unconstitutional." While respondent does not assert that the Double Jeopardy issues are not final for the purposes of appeal, it appears that the issues raised in Points of Petitioner's Brief also suffer from the same lack of finality.

[26] In *Stewart* the State of California sought a Writ of Certiorari after being denied a permanent writ of prohibition by the California Supreme Court. This Court granted Certiorari to preserve the federal issue involved.

before the proceedings have arrived at a definitive stop, *344 U.S. at 71.* The issue of whether the aggravating circumstances set out in §565.012 are unduly vague comes at a time prior to trial when it is clear that no definitive stopping point has been reached. See *Arceneaox* v. *Louisiana,* 376 U.S. 336 (1964). Moreover, in any criminal trial, the possibility looms large that further federal constitutional issues may arise. Thus, this Court may again be faced with deciding issues in this case. *Republic Natural Gas Company* v. *Oklahoma,* 344 U.S. at 71.

This Court has recognized that the finality requirement of 28 U.S.C. §1257 serves as a limitation on the review of state court decisions of constitutional issues so as to minimize federal intrusion in state affairs. *North Dakota State Board Of Pharmacy* v. *Snyder's Drug Stores, Inc.,* 414 U.S. 156, 159 (1973). As Justice Frankfurter stated for the majority in *Radio Station WOW* v. *Johnson,* 326 U.S. 120.

> This requirement (of finality) has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a state court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted to this Court the power to intervene in State litigation only after "the highest court of a state in which a decision in the suit could be had has rendered a final judgment or decree", 28 U.S.C. §344 (a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system, *326 U.S. at 124.*

This rationale is expecially applicable in this case when the potential for federal-state conflict is so strong. A full trial is yet to be had and the issue to be decided hinges upon a yet uninterpreted state statute addressing the sensitive topic of capital punishment. Thus, it appears that the best course of action in this case would be for this Court to defer making any decision until the Supreme Court of Missouri has had the opportunity to fully examine this question.

Six cases are not pending before the Missouri Supreme Court which involve the constitutionality of the language of 565.012.2 (17).[27] Unlike this case, these come to that court after a death sentence has been imposed. Recognizing that it is important in a federal system to give the state courts the first opportunity to decide the applicability of state statutes in light of constitutional challenges, it would be improvident for this Court to decide this issue. *Cardinale* v. *Louisiana,* 394 U.S. 437, 439 (1969). This seems especially so where the language to be interpreted has been held by this Court to be valid on its face. *Gregg* v. *Georgia,* 428 U.S. at 201. Admittedly, the Missouri Supreme Court, did, in cursory fashion, touch upon this issue in the underlying decision, although by petitioners own admission, it did not reach the "substantial history *et al*" language. That court was not however faced with a case where the death penalty had been imposed, thus thorough constitutional inspection was not needed.

The Abstention Doctrine, while not strictly applicable in this situation is instructive. This doctrine, founded on the "scrupulous regard for the rightful independence of the state government" and viewed as necessary "for the smooth working of the federal judiciary" has been employed by this Court in federal declaratory judgment suits to avoid unnecessary federal interference in state proceedings. *Railroad Commission Of*

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[27] *State* v. *Newlon,* No. 61798, *State* v. *McIlvoy,* No. 62026
State v. *Mercer,* No. 61797, *State* v. *Stokes,* No. 61963
State v. *Trimble,* No. 62523, *State* v. *Boulder,* No. 62362

Texas v. *Pullman Co.* 312 U.S. 496, 501 (1941). It has been held to be applicable to state criminal proceedings and thus in *Douglas* v. *City Of Jeanette,* 319 U.S. 157 (1943) it was stated:

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its immenence, even though alleged to be in violation of constitutional guaranties, is not a ground of equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence, the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity are to be supported only on a showing of danger of irrepairable injury "both great and immediate." 319 U.S. at 163.164

Thus, this Court has recognized the desirability of allowing states to decide questions of state law. *Railroad Commission Of Texas* v. *Pullman Co.,* 312 U.S. at 496. Of course, this is not to say that the abstention doctrine is an automatic rule used whenever a federal court is faced with a difficult issue of state law. *Baggett* v. *Bullitt,* 377 U.S. 360, 375 (1964). It is not. The Court has however used the doctrine where the constitutional challenge hinges on the meaning of an unclear state statute and where the state court's construction of the statute might avoid the need for a ruling on the question or where it might change or alter the federal issue to be reviewed. *Harris County Commissioner's Court* v. *Moore,* 420 U.S. 77, 83 (1973).

This latter notion is of course consistent with the teachings of Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288 (1936). In that case, Mr. Justice Brandeis reviewed the self-imposed rules erected by the Court to avoid unnecessary constitutional adjudications and stated that the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander,* (Justice Brandeis, concurring) at 347. This rule seems especially pertinent in this situation where there is the possibility that the jury, by imposing a life sentence, may moot the question, thus making unnecessary a decision on the federal constitutional questions.

In conclusion, this final issue should not be addressed by this Court. First, there is not a final judgment within the meaning of 28 U.S.C. §1257. There is still an entire trial to be held in this lawsuit. Secondly, the decision on the constitutionality of this statute, should in the first instance, be given to the state courts. Not only would this alleviate unnecessary federal-state conflict, it might make unnecessary a federal decision on the issue.

B. Vagueness

Petitioner argues that the aggravating circumstances pleaded by the State of Missouri in this cause are facially vague and overbroad. RSMo §565.012. Those sections read in pertinent part:

> Statutory aggravating circumstances shall be limited to the following:
>
> (1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind:

A review of the decisions in *Gregg* v. *Georgia,* 428 U.S. 153 and *Godfrey* v. *Georgia,* 100 S. Ct. 1759 (1980) reveals that this contention is without merit.

This Court, in *Gregg,* reviewed statutory language very similiar to that found in RSMo 565.012(7).[28] In rejecting the argument that this language was facially vague, the Court stated:

> "It is, of course arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open ended construction. In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance was that of (27-2534.1(b)(7) and that homicide was a horrifying torture-murder." *Gregg* v. *Georgia* 428 U.S. at 201.[29]

The Gregg Court has thus explicitly ruled that such language is not unconstitutionally vague on its face. Rather, the Court has looked to the state supreme courts to impose narrow interpretations of such statutory wording.

The Court had the opportunity to again review the language of the Georgia statute in *Godfrey.* Here the majority succinctly stated the issue before the Court:

> The issue now before us is whether in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the §(b) (7) aggravating circumstances as to violate the Eighth and Fourteenth

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[28] Georgia Code Annotated 27-2534.1(b)(7) states "the offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. RSMo. §565.012.2 (7) does not include aggravated battery to the victim.

[29] The Court upheld similar statutory provisions in *Profitt* v. *Florida,* 428 U.S. 242, 255-256 (1976).

Amendments to the United States Constitution. *Godfrey* v. *Georgia,* 100 S.Ct. at 1762.

The Court went on to examine the facts of *Godfrey* in light of the other cases in Georgia where the Georgia Supreme Court had upheld the death penalty under §27-2534.1 (b) (7). *Godfrey* v. *Georgia,* 100 S.Ct. at 1766-1767. The Court stated that the Georgia Supreme Court had in the past recognized its duty to channel jury discretion by its review of any aggravating circumstances found at the sentencing stage of the trial. This duty the majority noted carried with it "the responsibility of keeping §(b) (7) within constitutional bounds," *Godfrey* v. *Georgia,* 100 S.Ct at 1765. The Court then found that the circumstances of *Godfrey* did not satisfy the criteria set out in other Georgia cases and that the Georgia courts had not limited §(b) (7) in the *present* case (emphasis added). The judgment of the Georgia Supreme Court was therefore reviewed insofar as it left standing the petitioner's death sentence. *Godfrey* v. *Georgia,* 100 S.Ct. at 1767.

It becomes evident after reading *Godfrey* that the majority did not hold the language of (b) (7) void for facial vagueness. Rather that decision, as shown above, looked to whether the aggravating circumstances in *that* particular case were vague as applied to the set of circumstances before the Court. The opinion was aimed not at the statute *per se,* rather it was aimed at the interpretations and application of the language by the Georgia Supreme Court. This being so, the opinion in *Godfrey* offers no credence to petitioner's argument and *Gregg,* therefore, is controlling.[30] Applying *Gregg* to the statute at bar there can be no doubt that the language of the Missouri provision is not void for facial vagueness given that it is almost identical to the Georgia provision upheld in *Gregg*.

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[30] This position is bolstered by the fact that this Court has denied certiorari in at least two cases where the death sentence imposed was based on 27-2534.1 (6) (7): *Burger* v. *State,* 265 SE2d 796 (1980) cert. denied 100 S.Ct. 2975 (1980). *Blake* v. *State* 260 SE.2d 876 (1979) cert. denied 100 S.Ct. 2974 (1980).

Petitioner next contends that the language of 565.012.2(1) is vague on its face. In the area of capital punishment statutes, this Court has judged impermissibly vague statutes by examining whether the law avoids standardless sentencing discretion and arbitrary and capricious infliction of the death penalty. *Gregg* v. *Georgia,* 428 U.S. at 196. As the Court in *Godfrey* stated, (citations omitted) "it must channel the sentencer's discretion by clear and objective standards that provide specific detailed guidance and that make rationally reviewable the process of imposing a sentence of death." 100 S.Ct. at 1764-1765.[31] Thus the standards cannot be so vague as to fail to "adequately channel" the sentencing authority's imposition of the death penalty, with a resulting pattern of arbitrary and capricious application of the capital sanction. *Gregg* v. *Georgia,* 428 U.S. at 195. See also *Furman* v. *Georgia,* 408 U.S. 310 (OPINION OF J. WHITE, CONCURRING.)

A review of the language of Mo. Rev. Stat. §565.012.2 (1) reveals that it meets the concerns of *Furman* by providing the jury "with objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death." *Woodson* v. *North Carolina,* 428 U.S. at 303. An examination of the statute shows that the language limits the jury's consideration to either a prior capital murder conviction or to serious assaultive criminal convictions. If serious assaultive criminal convictions are present, the jury must find a substantial history of these type offenses before a sentence of death can be imposed. This provides the jury with guidance and direction in determining whether this aggravating circumstance is present and it limits the type of conviction they may consider. See *Godfrey* v. *Georgia,* 100 S.Ct. at 1762, footnote 2. That this

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[31] See *Gregg* v. *Georgia,* 428 U.S. at 198, *Proffitt* v. *Florida,* 428 U.S. at 153 (Opinion of STEWART, POWELL & STEVENS, JJ.) and *Woodson* v. *North Carolina,* 428 U.S. at 303 (Opinion of STEWART, POWELL & STEVENS, JJ.) These cases are the basis of the Court's discussion in *Godfrey.*

section makes rationally reviewable the process for imposing a sentence of death cannot be questioned. The Missouri Supreme Court could, without any difficulty, compare the prior records of those defendants against whom the death penalty was imposed with the records of those who were given life sentences.

Petitioner's argument apparently is that the infinite number of possible combinations of serious assaultive convictions must be set out in the statute. This, however, misinterprets the meaning of *Gregg*. The majority in *Gregg* specifically noted that the enumerated aggravated circumstances are by necessity somewhat general. *Gregg* v. *Georgia,* 428 U.S. at 193-194. The Court, in spite of this, found that such language did provide guidance to the sentencing authority, thereby reducing the likelihood of arbitrary and capricious imposition of the death penalty. The Court also viewed the availability of meaningful appellate review as a further check against capricious imposition. As has been pointed out, the State of Missouri provides such review. Mo. Rev. Stat. §565.014. Moreover, petitioner's assertion ignores this Court's finding in *Godfrey* that almost identical language was *considerably* (emphasis added) more specific or objectively measurable than §(b) (7), which it held facially valid in *Gregg*. *Gregg* v. *Georgia,* 428 U.S. at 201, *Godfrey* v. *Georgia,* 100 S.Ct. at 1762, footnote 2.

As shown above, this particular aggravating circumstance without question meets the dictates of *Gregg*. Additionally, there exists no reason which would lead the Court to believe that the Missouri Supreme Court will adopt an open-ended construc-

tion at this provision.[32] *Gregg* v. *Georgia,* 428 U.S. at 201. Indeed, this Section does not lend itself to being a "catch-all provision" as was the case in the language examined in *Godfrey. Godfrey* v. *Georgia,* 100 S.Ct. at 1965. Thus, it is clear that petitioner's argument as to the facial vagueness of this provision is without merit.

CONCLUSION

WHEREFORE, for the foregoing reasons, the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

JAMES J. COOK
Assistant Prosecuting Attorney

HONORABLE GEORGE R. WESTFALL
Prosecuting Attorney
St. Louis County, Missouri

MARK A. MILLER
Assistant Prosecuting Attorney
7900 Carondelet
Clayton, Missouri 63105
(314) 889-2600

Attorneys for Respondent

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[32] Mention should be made of petitioner's attack on the Missouri Supreme Court's opinion concerning the issue of vagueness, (J.A. 94). The Court's reasoning, viewed by petitioner as being "confidently asserted," was, without question, sound. That Court relied on the statements of this Court in reaching its decision on a facial vagueness attack. It must be remembered that the Missouri Supreme Court was not faced with a case where the death penalty had been imposed. As has been pointed out, it is yet to decide a death penalty case.

APPENDIX

APPENDIX

Revised Statutes of Missouri, 1978

565.001. Capital murder defined.-Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

565.006. Verdict as to guilt when rendered-finding of guilt, effect of-presentence hearing, admissible evidence-penalty, when imposed-reversible error, effect of.-1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider consideration of punishment, and by their verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible.

The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

565.012. Evidence to be considered in assessing punishment in capital murder cases.-1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence.

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence.

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether

a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendnt was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

565.014. Supreme court to review all death sentences, notice, contents of-findings required—assistant to supreme court authorized, parties of.—1. Whenever the death penalty is posed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the en record and transcript to the supreme court ether with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the ofense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

2. The supreme court of Missouri shall consider the punishment as well as any errors enumerated by way of appeal.

3. With regard to the sentence, the supreme court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

4. Both the defendant and the state shall have the right to submit briefs within the time provided by the supreme court, and to present oral argument to the supreme court.

5. The supreme court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Missouri in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

6. There shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital cases in which sentence was imposed after May 26, 1977, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant. The court shall be authorizied to employ an appropriate staff, within the limits of appropriations made for that purpose, and such methods to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence. The office of the assistant to the supreme court shall be attached to the office of the clerk of the supreme court for administrative purposes.

7. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.